

## Message Text

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ORIGIN L-02

INFO OCT-01 EUR-12 IO-10 ISO-00 OES-03 DLOS-03 OFA-01

CIAE-00 INR-07 NSAE-00 DODE-00 EB-07 DOTE-00 CG-00

COME-00 SP-02 /048 R

DRAFTED BY L/OES/JRCROOK: SCH

APPROVED BY L - MBFELDMAN

EUR/CAN - JANOWSKI (DRAFT)

D/LOS - ESKIN (DRAFT)

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FM SECSTATE WASHDC

TO AMEMBASSY OTTAWA

INFO USMISSION GENEVA

C O N F I D E N T I A L STATE 081744

FOR USDEL LOS

E.O. 11652: GDS

TAGS: PLOS, SENV, CA

SUBJECT: EASTPORT MAINE ENVIRONMENTAL BOARD ORDER

REF: OTTAWA 1054

1. DEPARTMENT HAS REVIEWED MAINE ENVIRONMENTAL BOARD'S ORDER IN LIGHT OF THOUGHTFUL QUESTIONS POSED REFTEL. FOR THE MOMENT, CERTAIN OF THE LEGAL AND PRACTICAL EFFECTS OF THE BOARD'S ORDER ARE NOT CLEAR. MUCH WILL DEPEND ON WHAT IF ANYTHING, PITTSTON TRIES TO DO WITH CANADIAN AUTHORITIES IN SEEKING TO COMPLY WITH ORDER. BECAUSE OF UNCERTAINTY OF PITTSTON'S PLANS, AND BECAUSE OF COMPLICATIONS RAISED BY CONCURRENT NEGOTIATIONS UNDERWAY WITH CANADIANS IN LAW OF THE SEA CONFERENCE, DEPT. WOULD PREFER TO AVOID DETAILED DISCUSSION OF LEGAL EFFECTS OF ORDER WITH CANADIANS AT THIS TIME, ALTHOUGH EMBASSY MAY NOTE U.S. VIEW THAT  
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ORDER DOES NOT ALTER OR AFFECT U.S. RIGHTS UNDER INTER-

NATIONAL LAW.

2. THE FOLLOWING OBSERVATIONS MAY, HOWEVER, BE OF INTEREST TO EMBASSY IN ITS OWN ASSESSMENT OF BOARD'S ORDER. ALTHOUGH BOARD'S ORDER DOES INTRUDE ON FEDERAL RESPONSIBILITIES FOR CONDUCT OF FOREIGN RELATIONS AND FOR DEFINING OF INTERNATIONAL LAW, THERE IS A LEGITIMATE STATE INTEREST IN DEFINING TERMS OF PORT ACCESS, AND EXTENT OF STATE INTERFERENCE WITH FEDERAL RESPONSIBILITIES REMAINS TO BE SEEN.

OUTCOME OF LOS CONFERENCE CONCEIVABLY COULD AFFECT THE ISSUE FOR THIS AND OTHER REASONS, IT DOES NOT SEEM PRUDENT FOR USG TO CHALLENGE MAINE ACTION AT THIS TIME. (FYI - PITTSTON MAY MOUNT SUCH A CHALLENGE, BUT WE ARE NOT SURE WHAT GROUNDS MIGHT BE ADVANCED.) END FYI. THE MORE IMPORTANT QUESTION MAY BE WHETHER THE ORDER IS ULTRA VIRES UNDER STATE LAW; WE CANNOT SAY WHETHER ITS TERMS AND CONDITIONS ARE CONSISTENT WITH THE CONSTITUTION AND LAWS OF THE STATE OF MAINE.

3. AS TO SOME MATTERS - SUCH AS AGREEMENT ON LOCATION OF AIDS TO NAVIGATION IN CANADIAN WATERS - DIRECT DISCUSSION AND AGREEMENT BETWEEN PITTSTON AND CANADIAN AUTHORITIES IS APPROPRIATE. THE U.S. RIGHT OF INNOCENT PASSAGE DOES NOT CARRY WITH IT A CORRELATIVE CANADIAN OBLIGATION TO FACILITATE OR EVEN APPROVE INSTALLATION OF AIDS TO NAVIGATION ON CANADIAN SOIL. (FYI - WE HAVE LONG WONDERED ABOUT THIS ASPECT OF PITTSTON PROBLEM, SINCE PITTSTON HAS INDICATED THAT AIDS TO NAVIGATION LOCATED IN CANADA ARE REQUIRED UNDER THEIR PROPOSAL. WE DO NOT BELIEVE CANADIANS ARE UNDER ANY LEGAL OBLIGATION TO AGREE TO THESE. PRESUMABLY, UNDER NEW LEGISLATION OR OTHERWISE, CANADA COULD REQUIRE THAT ALL PRIVATE AIDS TO NAVIGATION LOCATED ON CANADIAN SOIL BE INSTALLED AND MAINTAINED ONLY UNDER A DISCRETIONARY LICENSE. END FYI).

4. MOST TROUBLESOME, AS EMBASSY NOTES, ARE THE STANDARDS TO BE APPLIED TO "TRANSIT THROUGH AND PILOTAGE IN CANADIAN WATERS." THERE ARE WAYS OF IMPLEMENTING THIS PORTION OF BOARD'S ORDERS WHICH WOULD BE CONSISTENT WITH U.S. RIGHTS UNDER INTERNATIONAL LAW, BUT CANADIANS ARE UNLIKELY

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TO SPLIT THE REQUISITE HAIRS. IN OUR VIEW, NO ARRANGEMENT BETWEEN PITTSTON AND CANADIAN AUTHORITIES CONCERNING THESE MATTERS COULD ALTER OR AFFECT THE RIGHT OF INNOCENT PASSAGE ENJOYED BY U.S. AND THIRD FLAG VESSELS. ALL PITTSTON COULD DO WOULD BE TO REQUIRE VESSELS COMING TO ITS FACILITY TO CONFORM TO CANADIAN TERMS AND CONDITIONS AS A CONDITION FOR PORT ENTRY. IT COULD NOT ENLARGE CANADIAN RIGHTS TO ENFORCE THEIR REGULATIONS AGAINST TRANSITING VESSELS WITHIN

HEAD HARBOR PASSAGE.

5. SHOULD CANADIANS EVEN AGREE TO TALK TO PITTSTON, THEY WOULD PRESUMABLY TAKE POSITION THAT CANADA IS LEGALLY ENTITLED TO SET AND ENFORCE THE FULL GAMUT OF SIZE, CONSTRUCTION AND OPERATION REQUIREMENTS AGAINST ALL VESSELS TRANSITING HEAD HARBOR PASSAGE. ANY ATTEMPT AT ENFORCEMENT AGAINST A VESSEL NOT IN COMPLIANCE WITH SUCH REGULATIONS WOULD SQUARELY RAISE THE BASIC LEGAL ISSUE OF THE CHARACTER OF U.S. RIGHTS IN HEAD HARBOR PASSAGE, AND COULD  
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BE SUBJECT TO PROTEST OR OTHER ACTION BY THE UNITED STATES.

6. DEPENDING ON PITTSTON'S FUTURE ACTIONS, DEPARTMENT MAY CONSIDER WRITTEN NOTIFICATION TO CANADIANS OF U.S. VIEW THAT NO ARRANGEMENT ENTERED INTO BY PITTSTON CAN ALTER OR AFFECT U.S. RIGHTS UNDER INTERNATIONAL LAW, AND EXPRESSLY RESERVE SUCH RIGHTS. KISSINGER

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## Message Attributes

**Automatic Decaptioning:** X  
**Capture Date:** 01 JAN 1994  
**Channel Indicators:** n/a  
**Current Classification:** UNCLASSIFIED  
**Concepts:** MARINE TRANSPORTATION, AGREEMENTS, NAVIGATIONAL AIDS, REFINERIES  
**Control Number:** n/a  
**Copy:** SINGLE  
**Draft Date:** 10 APR 1975  
**Decaption Date:** 01 JAN 1960  
**Decaption Note:**  
**Disposition Action:** RELEASED  
**Disposition Approved on Date:**  
**Disposition Authority:** ElyME  
**Disposition Case Number:** n/a  
**Disposition Comment:** 25 YEAR REVIEW  
**Disposition Date:** 28 MAY 2004  
**Disposition Event:**  
**Disposition History:** n/a  
**Disposition Reason:**  
**Disposition Remarks:**  
**Document Number:** 1975STATE081744  
**Document Source:** CORE  
**Document Unique ID:** 00  
**Drafter:** SCH  
**Enclosure:** n/a  
**Executive Order:** GS  
**Errors:** N/A  
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**Original Handling Restrictions:** n/a  
**Original Previous Classification:** n/a  
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**Page Count:** 3  
**Previous Channel Indicators:** n/a  
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**Reference:** 75 OTTAWA 1054  
**Review Action:** RELEASED, APPROVED  
**Review Authority:** ElyME  
**Review Comment:** n/a  
**Review Content Flags:**  
**Review Date:** 05 MAY 2003  
**Review Event:**  
**Review Exemptions:** n/a  
**Review History:** RELEASED <05 MAY 2003 by Izenbel0>; APPROVED <24 SEP 2003 by ElyME>  
**Review Markings:**

Margaret P. Grafeld  
Declassified/Released  
US Department of State  
EO Systematic Review  
05 JUL 2006

**Review Media Identifier:**  
**Review Referrals:** n/a  
**Review Release Date:** n/a  
**Review Release Event:** n/a  
**Review Transfer Date:**  
**Review Withdrawn Fields:** n/a  
**Secure:** OPEN  
**Status:** NATIVE  
**Subject:** EASTPORT MAINE ENVIRONMENTAL BOARD ORDER  
**TAGS:** PLOS, SENV, CA  
**To:** OTTAWA  
**Type:** TE  
**Markings:** Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 05 JUL 2006